COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

WESTON DEVELOPMENT GROUP

v.

HOPKINTON ZONING BOARD OF APPEALS

No. 00-05

DECISION

May 26, 2004

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

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DECISION

This is an appeal, pursuant to G.L. c. 40B §§ 20-23, brought by Appellants from a decision of the Hopkinton Zoning Board of Appeals, denying a comprehensive permit for the construction of 40 units of two bedroom single family elderly housing on a parcel of land situated off of Chamberlain Street in Hopkinton. After the filing of this appeal, nineteen of the neighbors living on Chamberlain Street moved to intervene and were allowed to fully participate in the hearing as amici. The parties agreed to engage in mediation, which resulted in an agreement between the parties. This agreement required Appellants to develop detailed plans incorporating the agreed to changes.

The parties also agreed to a remand to the Board for further review of the application as revised. However, after further consideration the Board again denied the permit stating that the revised plans did not comply with portions of the local wetlands bylaw and that it would not

waive them. The parties agreed that for the purposes of this appeal, the only outstanding issues were those involving the local wetlands bylaw, specifically whether a wildlife and hydrogeologic study was required, and whether compliance with the buffer zones and setbacks as identified in the bylaw were necessary to protect the associated wetlands.

The Committee finds that the interests asserted by the neighbors are exactly the same interests diligently represented by the Board, and therefore their motion to intervene is denied. Furthermore, the local Conservation Commission could not require Appellants to complete a wildlife and hydrogeologic study, as Appellants had filed its initial application before the Town had adopted the regulation requiring such studies. The Committee also finds that the Board failed to meet its burden of proof that the disputed portions of the wetlands bylaw address a valid local concern that would support denial of a comprehensive permit.

I. PROCEDURAL ISSUES

A. Procedural History

On May 31, 2000, the Hopkinton Zoning Board of Appeals filed a decision with the town clerk denying Appellants' January 14, 1999, application for a comprehensive permit. The original application was for 48 detached single-family condominium units for persons age 55 and older, which had been proposed under the Local Initiatives Program (LIP). On June 19, 2000, Weston appealed this decision to the Committee in accordance with G.L. c. 40B, §22. Shortly thereafter, the Board and Appellants engaged in formal mediation that resulted in an "Agreement and Stipulation for Entry of Judgment" (Agreement). In the Agreement, Appellants agreed to reduce the project to 40 condominium units in 10 clusters of 4 attached townhouse dwellings, of

which 10 units would be offered as low or moderate income units under LIP. However, the Agreement was contingent upon the Board's review and approval of additional detailed engineering plans to be provided by Appellants' engineer.

On December 21, 2000, nineteen abutters and neighbors[1] moved to intervene. The Committee took no formal action on this motion, but instead granted the neighbors the status of amici curiae and permitted them to participate fully in the proceedings through counsel. The Agreement was subsequently presented to the Committee on February 27, 2001, with a request that we issue a "Decision on Stipulation." However, the proceedings before the Committee were continued in order to allow the neighbors and the Board an opportunity to review the more detailed engineering plans. The Board held hearings in May and June of 2001 resulting in further revisions of the plans.

While retaining its ongoing jurisdiction of the case, the Committee issued an Order on June 28, 2001, which remanded the case to the Board for further review of the remaining wetlands issues and to finalize several minor landscaping issues that were of concern to the neighbors. In their decision dated September 27, 2001, the Board disapproved the detailed plans, denied the waivers from the local wetland regulations, and therefore, again denied Appellants' application for a comprehensive permit.

The Committee then conducted a site visit, held a 3-day de novo hearing, with witnesses sworn and full rights of cross examination, and a verbatim transcript. William D. Hannigan, a

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1. The abutters include Steven and Dana Robinson, Roy and Joanne Rector, Vincent and Patricia Cerulle, Kathleen Kearns, India B. Nolen, Suzanne Gendel and John McCarthy, John F. Haggerty, Ronald and Marilyn Segars, Robert and Carole Slaman, Rober and Karen Barnes, Mark Segars and Kimberly Lentros-Segars. Of these, it appears that the first eleven (up to and including John F. Haggerty) are direct abutters to the project.

professional civil engineer, and Ann Marton, an environmental consultant, provided expert testimony for Appellants. Witness for the Board was Ellen M Chagnon, a wetlands scientist and consultant to the Hopkinton Conservation Commission. Witnesses for the neighbors included John Haggerty and Robert Slaman, who are residents of Chamberlain Street, and Roy Rector, a direct abutter to the project area. Following the presentation of evidence, counsel submitted post-hearing briefs.

B. Jurisdiction

To be eligible for a comprehensive permit and to maintain an appeal before the Housing Appeals Committee, three jurisdictional requirements must be met. The applicant must be a limited dividend organization, the applicant must control the site, and the project must be fundable under an affordable housing program. See 760 CMR 31.01(1). The parties have stipulated that Appellants have satisfied all of these jurisdictional requirements. Pre-Hearing Order, § I-25 through 27. In addition, the Board stipulated that the Town of Hopkinton has not currently satisfied any of the statutory minima defined in G.L. c. 40B, § 20, therefore foreclosing the defense that its decision is consistent with local needs as a matter of law pursuant to that section. Pre-Hearing Order, § I-24.

C. Motion to Intervene

On December 21, 2000, eleven abutters and eight property owners along Chamberlain Street filed a Motion to Intervene in this appeal pursuant to 760 CMR 30.04(2) and G.L. c. 40B, §§ 22, 23.[2] In establishing the basis of intervention in these proceedings, it is necessary to clarify

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2. The neighbors also cite to G.L. c. 23B, §5A as a basis for intervention. However, that statute provides for the creation of the Housing Appeals Committee and does not contain a provision for intervention.

that G.L. c. 40B, §§ 22, 23, does not provide for intervention and instead creates a separate procedure by which an applicant may appeal the denial of a comprehensive permit, or grant of a comprehensive permit with such conditions and requirements as to make the building or operation of such housing uneconomic. Parties who are aggrieved by the issuance of a comprehensive permit are directed by G.L. c. 40B, § 21, that they may appeal to either the superior court or to the land court as provided in G.L. c. 40A, §17.[3]

Intervention in the current proceedings is in compliance with the Massachusetts Administrative Procedure Act, G.L. c. 30A, and specifically § 10, which addresses adjudicatory procedures. Section 10 states that an agency "may allow any person showing that he [or she] may be substantially and specifically affected by the proceeding to intervene as a party in the whole or any portion of the proceeding, and [may] allow any other interested person to participate by presentation of argument orally or in writing, or for any other limited purpose, as the agency may order." This sets out the first sentence of the Housing Appeals Committee procedural regulation 760 CMR 30.04, which deals with "Parties Intervention."

Based on the permissive "may" in § 10, the Supreme Judicial Court has repeatedly recognized that agencies have *broad discretion* to grant or deny intervention. *Tofias v. Energy Facilities Siting Board*, 435 Mass. 340, 346, 757 N.E.2d 1104, 1109 (2001). "The discretion to limit intervention was obviously intended to permit the department to control the extent of participation by persons not sufficiently and specifically interested to warrant full participation, which might interfere with complicated regulatory processes." *Newton v. Department of Pub.*

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3. See *Mahoney v. Board of Appeals of Winchester*, 366 Mass. 229, 231-232, 316 N.E.2d 606 (1974); *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 363-368, 294 N.E.2d 393 (1973).

Utils., 339 Mass. 535, 543 n.6, 160 N.E.2d 108, 113 (1959). However, the Committee may allow persons who are not substantially and specifically affected to participate in proceedings for limited purposes. A petitioner must demonstrate a sufficient interest in a proceeding before the Committee will exercise its discretion and grant limited participation. See *Boston Edison Co. v. Department of Public Utils.*, 375 N.E.2d 305, 332, 375 Mass. 1, 45 (1978). The Committee is not required to allow all petitioners seeking intervener status to participate in proceedings. See *Id.*

Additionally, 760 CMR 30.04(2) states,

> In determining whether to permit a person to intervene, the Committee shall consider only those interests and concerns of that person which are germane to the issue of whether the requirement and regulations of the city or town make the proposal uneconomic or whether the proposal is consistent with local needs. The Committee shall not allow a person to intervene if his or her interests are substantially similar to those of any party and no showing is made that one or more of the parties will not diligently represent those interests.

Therefore, to successfully support a motion to intervene the neighbors must show that they will be substantially and specifically affected by the outcome of the proceedings before the Housing Appeals Committee and specifically that their harm would be related to the granting of relief from local regulation as requested by the developer in this appeal,[4] that their harm is not a

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4. This means that "a potential intervener must show both (1) a concrete injury it is likely to suffer caused by the project and (2) a nexus between the relief sought and the subject matter of the proceeding." *Matter of Massachusetts Highway Department*, Docket Nos. 96-036 and 96-041, 3 DEPR 203, 205 (Ruling on Highway Department's Motion for Summary Decision and Stockbridge's Request to Intervene, October 30, 1996); see also *Matter of Algonquin Gas Transmission Company*, Docket Nos. 98-154 and 98-178, (Ruling on Motion for Reconsideration and Motion to Reargue, November 22, 1999).

common harm which is shared by the all the residents of the Town, and that the Board will not diligently represent those interests.[5]

It is not enough that the proposed interveners are abutters, as the rebuttable presumption established by G.L. c. 40A, § 11, does not apply to administrative proceeding under G.L. c. 30A. See also 760 CMR 30.04(3)(c). Therefore, the parties seeking to intervene must do so based on a showing that they will be substantially and specifically affected by these proceedings. Initially the neighbors' argued that they should be permitted to intervene due to safety issues created by an increase in traffic on the street, related concerns with respect to emergency vehicle access and egress, damage caused by drainage and sewage issues associated with the environmentally sensitive nature of the site, threats to the sensitive ecological balance of the area and the wildlife that live in it, and that the project is too dense and therefore is not in keeping with the surrounding neighborhood.

After submission of their initial motion to intervene, the neighbors were allowed to actively participate in the review of the more detailed plans developed by Appellants' engineer and to provide input into the modification of those plans. This may in some way explain that in their post-hearing brief, the neighbors focused their interests on only one issue, that being the impact of the proposed project on the local environment. This issue is not only substantially

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5. In addition the harm stated must not be speculative. "Although the statutory standard that a petitioner for intervention be specifically and substantially affected is not precisely defined, this legal requirement cannot be satisfied by conclusory repetition of the statute's language. To do so would risk reducing legal pleadings to empty formality. To accept as satisfying the terms of G.L. c. 30A, s. 10(4) a perfunctory statement of speculative effect would be to treat the Legislature's express precondition to intervene as nearly meaningless. This we may not permit. The statute should not be applied to strip it of meaning. *Matter of Yankee Milk*, 372 Mass. 353, 358 (1977); *Bolster v. Commissioner of Corporations and Taxation*, 319 Mass. 81, 84-85 (1946)." *Mass. Elec. Co.*, D.P.U. 94-112 at 7-8 (November 1, 1994). See also *Tofias v. Energy Facilities Siting Board*, 435 Mass. 340, 348, 757 N.E.2d 1104, 1110 (2001).

similar to the issue being asserted by the Board, it is exactly the same issue. This is an interest or concern that is shared by all of the residents, and the type of concern to be voiced by the representative of the residents, specifically the Board of Appeals, at the Committee hearing. See 760 CMR 30.04(3)(a).

As the neighbors have failed to show that they will be substantially and specifically affected by these proceedings, and that their interest and concern is unique and not one that is shared potentially by all residents of the Town, and as their interest and concern is the same one that was asserted and diligently represented by the Board, the neighbors Motion to Intervene is denied.

D. Motion in Limine

On February 14, 2003, Appellants submitted a motion in limine requesting a determination by the Committee that it had complied with or asked for the appropriate waivers from the local wetlands regulations in effect at the time of the initial application and was therefore not required to comply with a policy of the Hopkinton Conservation Commission. The policy in question would require Appellants to complete a wildlife and hydrogeologic study for the project area. The Board argues that as the Commission adopted this policy prior to the submission of the Appellants' application,[6] it had the full force of being a regulation and required Appellants to either obtain a waiver or to comply with the policy.

Appellants further argue that as the construction of affordable housing at this site will not result in an unanticipated public health or safety concern, this issue is controlled by the

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6. Appellants filed its application for a comprehensive permit sometime in January of 1999. Exh. 1. The parties agree that the Commission implemented the policy on or about April 27, 1998, and that it was not formally adopted as part of the local bylaw until February 29, 2000. Tr. I, 14-23.

Committee's decision in *Northern Middlesex Housing Associates v. Billerica*, No. 89-48 (Mass. Housing Appeals Committee Dec. 3, 1992). Therefore, the only applicable requirement in effect at the time of the application was Chapter 206, Wetlands Protection, of the General Bylaws of the Town adopted on May 2, 1995, as amended through May 1996, and its Regulations, Sections 9.1-9.8. Appellants also contend that as a matter of law, a policy does not rise to the level of being a bylaw or regulation and thus Appellants are not obligated to comply with the policy or to obtain a waiver from it. See *Town of Northbridge v. Town of Natick*, 394 Mass. 70, 474 N.E.2d 551 (1995).

The Board has not argued that the bylaw explicitly confers the force of law upon regulations prior to their adoption by town meeting. In fact, Section 9.1 of the bylaw states, "After public notice and public hearing, the Commission may promulgate rules and regulations to effectuate the purpose of this bylaw." There is nothing in the evidence presented to support a conclusion that public notice and hearing had been completed prior to the Committee's adoption of the policy on April 27, 1998. Tr. I, 14-23. Instead the Board asserts in its brief that G.L. c. 40, § 8C, authorizes a conservation commission to adopt rules and regulations governing the use of land and waters under its control and to prescribe penalties for any violation thereof. Unlike a bylaw, which must be formally adopted by the town meeting pursuant to G.L. c. 40, § 21, a rule or regulation can be adopted by a Conservation Commission at a meeting and is not subject to the formality required under § 21.

However, such an argument is unsupported by fact, as the actual wording in 8C is, "The commission may adopt rules and regulations governing the use of land and waters under its control, and prescribe penalties, not exceeding a fine of one hundred dollars, for any violation

thereof." It should be noted, that this sentence is entwined with a discussion of the acquisition of lands either by purchase or through eminent domain by the town for conservation purposes. The Board's use of an isolated and paraphrased sentence in 8C does not lend itself to an interpretation that the commission has an independent authority to promulgate rules and regulations in general, but is instead one directed solely to lands that come to be within the ownership of the town or city in compliance with this section. See G.L. c. 40, § 8C.

The motion was argued before the Committee on March 4, 2003, at which time the Chairman, as presiding officer, ruled that *Northern Middlesex* was indeed controlling. In the *Northern Middlesex* case, the board argued that construction of that project would violate the local health regulations that prohibited construction in the vicinity of a flood plain. *Northern Middlesex* slip op. at 9. However, the regulation was not actually in affect at the time the developer had filed its application for a comprehensive permit. See *id.* The Committee noted that if local boards could promulgate and enforce new regulations after the filing of an application, some towns might be motivated to use this as a means by which to defeat the purpose of the statute, which is to ensure that local rules and regulations are not promulgated in an effort to exclude the construction of low and moderate income housing. See id.; *Zoning Bd. of Appeals of Greenfield v. Housing Appeals Committee*, 15 Mass. App. Ct. 553, 446 N.E.2nd 748 (1983).

In considering an analogous issue involving the subdivision control law, G. L. c. 41, §§ 81K to 81GG, the Supreme Judicial Court found that the "law attaches such importance to [local] regulations as to indicate to us that they should be comprehensive, reasonably definite, and carefully drafted, *so that owners may know in advance what is or may be required of them* and

what standards and procedures will be applied to them. Without such regulations, the purposes of the law may easily be frustrated." *Castle Estates, Inc. v. Park and Planning Bd. of Medfield*, 344 Mass. 329, 334, 182 N.E.2d 540, 544 (1962). This analysis is equally applicable for the comprehensive permit law as it requires the Board's decision to be consistent with local needs, which in turn requires that *regulations* be reasonable in view of the regional need for low and moderate income housing. G.L. c. 40B, § 20, 23.

Therefore, in keeping with our decision in *Northern Middlesex* and the additional analysis presented above, the Committee finds that *any regulation not in effect at the time of the filing of the application* will not be applied to this project. Tr. II, 37-42; Tr. III, 23. Appellants' motion is granted and it is therefore not required to either comply with or obtain waivers from the policy requiring the completion of a wildlife and hydrogeologic study for this project site.[7]

II. FACTUAL BACKGROUND

The project site comprises two parcels, the first consisting approximately 22.08 acres and the second adjacent parcel is 35,371 square feet.[8] Exh. 1 & 2. The project site is located on Chamberlain Street and Hilltop Road in Hopkinton. Exh. 2. Wetlands are located in the center

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7. The Board also argued that if Appellants had filed with the Commission as the Board claims it directed Appellants to do throughout the initial hearing process, the need to comply with the policy would have become apparent prior to the appeal and subsequent remand. Tr. II, 31. However, G.L. c. 40B, § 21, directs the Board to notify each applicable local board of the filing of applications for comprehensive permits and to request from those boards their concerns and comments as deemed necessary or helpful in making its decision as to whether or not to issue the permit. Therefore, it would be manifestly unfair to require compliance with this policy so far into the appeal process. Tr. II, 41. Finally, it would serve no purpose at this time to require compliance with the policy, as an adequate review of the project area has already been completed as part of the appeal process and was supplemented with expert witness testimony during these proceedings. Tr. II, 41.

8. The second smaller parcel was purchased to provide a second means of ingress and egress to

and the northeasterly portions of the site. The topography of this site includes slopes of 2% to 5%. The onsite slopes generally fall off from the east and west to form a valley where and intermittent stream and associated bordering vegetated wetland flows from a vernal pool in a north to south direction. Exh. 2. The site is moderately wooded with occasional scattered boulders and some ledge rock outcrops. Exh. 2. There is an intermittent stream located in the south central portion of the project site and a vernal pool in the west central portion of the site. Exh. 56. There is a second vernal pool located outside of the project area, on the south side of Chamberlain Street. Exh. 57. An abandoned railroad bed runs in a north to south direction to Chamberlain Street across the easterly portion of the site. Appellee's Post-hearing Brief, p.5. North of the site is a public elementary school. Residential properties abut the site on the other three sides.

The proposed project is located in the Residence B Zoning District of Hopkinton. As redesigned the project would include the construction of 40 condominium units in 10 clusters of 4 attached town-house dwellings, and 1 community building, for persons of age 55 or older. Exh. 2. Of the 40 units, 30 would be market rate and 10 would be offered under the LIP program as affordable units. All of the units will be allowed to hook-up to the municipal water system.

Access to the development will be by a loop road to be called Sanctuary Lane, which will enter and exit from two points on Chamberlain Street. Chamberlain Street is a straight roadway traveling west from Hayden Rowe Street, which is State Route 85, a major roadway in the Town. Chamberlain Street extends for a distance of approximately three quarters of a mile and is a two

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Chamberlain Street. Exh. 2.

lane, two-way road with no posted speed limits and terminates in a dead end. It is approximately 16 feet wide and has no sidewalks.

III. DENIAL OF A COMPREHENSIVE PERMIT

Where the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, the developer may establish a prima facie case by showing that its proposal complies generally with state and federal requirements or other generally recognized design standards. 760 CMR 31.06(2).

The burden then shifts to the Board, requiring a two-step inquiry to determine whether the denial by the Board complies with G.L. c. 40B, § 23. The Board must initially establish that there is a valid health, safety, environmental, design, open space, or other local concern, which supports the denial. 760 CMR 31.06(6). If the Board can establish the existence of a valid local concern, it must then further demonstrate that the local concern outweighs the regional need for housing. 760 CMR 31.06(6); see also *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365, 294 N.E.2d 393, 412 (1973); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988). The developer has the burden to prove that there are preventive or corrective measures that have been proposed which will mitigate the local concern, or that there is an alternative means of protecting the local concern. 760 CMR 31.06(9).

A. Project Compliance with State and Federal Requirements

Since Appellants' Motion in Limine has been granted with regard to the wildlife and hydrogeologic studies, the only issue outstanding is whether the construction of the proposed development would create unacceptable impacts on the interests protected by the Hopkinton Wetlands Bylaw and Regulations promulgated there under (bylaw). Therefore, Appellant must establish that the proposal complies generally with state and federal requirements as to this issue.

During the proceedings before the Commission, Appellants had initially submitted a loop road configuration with two full vehicular ingress and egress drives from Chamberlain Street. Pre-Hearing Order, I-19. In response to the concerns of the Commission, an alternate cul-de-sac plan with one full vehicular ingress and egress drive from Chamberlain Street and an emergency vehicle drive from Chamberlain Street was also provided. Pre-Hearing Order, I-19. Subsequent plans prepared by Appellants have added some of the features desired by the Commission, such as permanent barriers in certain locations, as well as replication of wetlands under the bylaw. Pre-Hearing Order, I-21, 22; Exh. 44. Despite these concessions, the Commission denied approval of Appellants' Notice of Intent in a decision dated August 29, 2001. Exh. 7; Pre-Hearing Order, I-17.

Appellants appealed the denial to the Commonwealth of Massachusetts Department of Environmental Protection (DEP) and by a decision dated May 29, 2002, DEP issued a Superceding Order of Conditions (order) approving the plans for this project. Exh. 8. This order states that the project does not propose to alter any wetland resource areas and that work is limited to the 100-foot buffer zone to a bordering vegetated wetland, and as proposed, would protect the interests of the Act. Therefore, the Superceding Order issued by the DEP establishes

Appellants' prima facie case that with respect to those aspects of the project that are in dispute, its proposal complies with federal or state statutes or regulations.[9] 760 CMR 31.06(2).

B. Local Concerns

As Appellants have successfully established its prima facie case, the burden shifts to the Board to first establish that there is a valid health, safety, environmental, or other local concern, which supports the denial. G.L. c. 40B, §§ 20, 23; 760 CMR 31.05(2), 31.06(2), 31.06(6); *Hanover v. Housing Appeals Committee,* 363 Mass. 339, 294 N.E.2d 393 (1973).

1. Impacts on the interests protected by the Hopkinton Wetlands Bylaw

The only unresolved issue for this project involves denial of the request for waivers from the local wetlands bylaw in effect at the time of the initial application for this comprehensive permit. The Board argues that the project will have unacceptable impacts on the interests protected by the bylaw. Although this concern is for the overall wetland system, the Board concentrated much of its argument on the impacts to an isolated vegetated wetland, the bordering vegetated wetland, two vernal pools (one within the project area and another just outside and to the south of the project area), and the associated wetland dependent species. Exh. 56. The Board also argues that the project could have an impact on the local hydrology and could cause a change in the balance of surface water and groundwater flow and without further studies on these areas of concern, the resulting impact cannot be ascertained. Tr. III, 74.

Appellants offered two expert witnesses to testify on this issue. The first was William Hannigan, a registered professional civil engineer. Tr. I, 42; Exh. 33. Mr. Hannigan testified

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9. Based on the order, either of the two vehicular drive configurations is permitted. Exh. 8 & 9; Pre-Hearing Order, I-20. Appellants intend to build the loop road configuration. Tr. I, 92.

there would be no impact on the wetland resources as identified under the state Wetlands Protection Act. Tr. I, 88. He further testified that the project would not include filling or altering of any wetlands as recognized by the Act. Tr. I, 88. Furthermore, the vernal pools and their associated habitat areas would not be altered. Tr. I, 88.

However, the bylaw limits impacts within wetland buffer zones and recognizes isolated wetlands for protection. Tr. I, 88; Tr. III, 32. Mr. Hannigan testified that the project would require the filling of 1,040 square feet of the isolated vegetated wetland. Tr. I, 90-91. As a mitigation measure, Appellants will provide 2,125 square feet in replication area. Tr. I, 91. There will be no work within the 100-foot buffer for the on-site vernal pool or within the pool itself. Tr. I, 148. Work related to the realignment of Chamberlain Street would be within the 100-foot buffer of the off-site vernal pool across Chamberlain Street to the south. Tr. I, 93.

In addition, the bylaw requires three specific limitations of work or setback distances for certain types of work from the buffer areas bordering vegetated wetlands: 1.) buildings are to be 50 feet from wetlands; 2.) roadway pavement is to be 30 feet from wetlands; and 3.) grading for roadways are to be 25 feet from wetlands. Tr. I, 89; Tr. III, 33. None of the proposed buildings are within the 50-foot setback, but a portion of the roadway and roadway grading are within the 30 or 25-foot setbacks. Tr. I, 89. Appellants will provide clay barriers (anti-seep collars) along all piping for sewer and drainage. Tr. I, 56, 126. The project is in full compliance with state Title 5 requirements as it is a "pressure dosed system" that has also been approved by the Hopkinton Board of Health. Tr. I, 66-67. The project will be served by town water. Tr. I, 123. Appellants will actually be providing more water for recharge than is required by the DEP stormwater management policy. Tr. I, 84-85.

Appellants also offered the testimony of Ann McDaniel Marton, an environmental consultant on wetlands, wildlife, and endangered species. Tr. II, 42-43; Exh. 34. According to Ms. Marton, the on-site vernal pool was certified by Natural Heritage Endangered Species Program based on mole salamanders, specifically spotted salamanders, and facultative invertebrates, specifically caddis flies. Tr. II, 72. The off-site vernal pool was certified based on wood frogs and facultative invertebrates including caddis flies and fingernail clams and some other species. Tr. II, 72. She further testified that these two vernal pools are very typical of vernal pools across Massachusetts in that they exhibit the standard characteristics, visual observations, and contain all of the species commonly found within vernal pools. Tr. II, 76-77.

The work that is proposed within the buffer of the off-site vernal pool includes shifting of the pavement as to its layout within the roadway, construction of an entranceway, grading of the shoulders, and some vegetation clearance to improve sight distance. Tr. II, 83, 88. This alteration is about 2,800 square feet of work. Tr. II, 84. It was Ms. Marton's opinion that as there are about 4 ½ acres of buffer zone to the south of Chamberlain Street and another 3 ½ acres to the north, the overall impact is very minor in the context of the habitat that surrounds that vernal pool. Tr. II, 85.

Ms. Marton also testified that as to the isolated vegetated wetland, it would be difficult for someone walking through the woods to even notice its existence and that it does not hold water for a long period of time. Tr. II, 80. It was her opinion that the proposed wetland replication would create a stronger connection to the groundwater than exits in the isolated vegetated wetland, as it would be a part of a much larger system, and that the replicated wetland

area will include a greater diversity of plant species to provide for a greater wildlife habitat value. Tr. II, 81.

2. Board's burden of Proving Local Concerns Supporting Denial of the Permit

Since its inception, the Committee has held that once the appellant has established a prima facie case, the burden of proof with regard to local concerns falls upon the Board. *Red Gate Road Realty Trust v. Tyngsborough*, No. 93-01, slip op at 4 (Mass. Housing Appeals Committee December 8, 1993). To meet this burden, the Board offered the expert testimony of Ellen Chagnon, a wetland scientist who is employed as a consultant for the Commission, to address the local concern for the protection of wetland resources within and adjacent to the project area.

According to Ms. Chagnon, the bylaw forbids any work within the 100-foot buffer zone around the vernal pool, restricts work within the buffer zone to the bordering vegetated wetland, and treats isolated vegetated wetlands as resources for protection. Tr. III, 33, 51. She testified that prohibiting work within the 100-foot buffer zone of the venal pool is necessary because many of the species associated with these pools use this area as habitat for part of their lifecycles. Tr. III, 39. In addition, it decreases the likelihood of direct impacts to the vernal pool. Tr. III, 44.

Ms. Chagnon further testified that the reason the bylaw considers the buffer zone of the bordering vegetated wetland to be a protected resource area, and therefore places the set-back restrictions on work within this buffer, is that any activity in that resource area is likely to produce impacts to the associated wetland resource area. Tr. III, 34. An applicant must therefore demonstrate that the activity proposed within this buffer would not impact the adjacent wetland before the Commission would allow the work. Tr. III, 34. Ms. Chagnon testified that the need

for this protection arises from the fact that these resources areas are not protected under the state Act and that they have value relative to local wildlife habitat, water quality, and flood storage, that makes them significant in her opinion. Tr. III, 36. She testified that the isolated vegetated wetland should be protected as a resource area because it also has value on a local scale generally for storm water storage, for wildlife habitat, and for maintenance of water quality. Tr. III, 51. In addition, the isolated vegetated wetland in this case is within the 100-foot vernal pool buffer zone. Tr. III, 51.

However, the testimony and other evidence offered by the Board did not go so far as to establish any definable impact that the proposed project would have on the wetland resources. Ms. Chagnon's testimony established only that further studies would be necessary before any conclusions could be made as to the possible impacts of the project on the local wetland resources, wildlife habitat, or change in the water budget on site. Tr. III, 44-49, 51-52, 55-59, 61-64, 69-70, 75. She also testified that she had not performed any independent assessment herself, and that she had not personally obtained any data related to hydrogeology or wildlife habitat on the site. Tr. III, 94-95.

As an appeal before the Housing Appeals Committee is *de novo*, what the Board needs to provide once the appellant has established its prima facie case, is *evidence* sufficient to *persuade* the Committee that *it is more likely than not* that the granting of the comprehensive permit would be in contradiction to a valid local concern and that the resulting harm would outweigh the regional housing need. Testimony indicating that additional studies should be performed to determine the total impact, if any, on the site is not the kind of evidence required to establish that the proposed development impinges upon a specific valid local concern.

Ms. Chagnon's testimony did not provide a basis as to why a 100-foot "no build" buffer or setback requirements would be sufficient in size to provide for the protection of the wetland resources.[10] She did not provide testimony on the known species associated with the wetland resources within or adjacent to the proposed project site or provide any information on their estimated habitat range, which could be used to establish the adequacy of buffers and setbacks.[11] Furthermore, Ms. Chagnon's testimony was no more than speculative on the issue of possible impacts from the proposed project. She stated that harmful impacts "might" or "could" occur. Tr. III, 58-59, 64, 70, 76-77. Conjecture, even when offered by a credible expert witness, does not provide the type or measure of evidence necessary to persuade the Committee that the project as proposed would result in an adverse impact on the wetland resources intended to be protected by the bylaw.[12]

Therefore, the Committee finds that the Board has not met its burden of proving that a valid health, safety, environmental, design, open space, or other local concern supports the Board's denial of the comprehensive permit. As the Board has failed to establish a valid local

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10. Ms. Chagnon did testify that the buffers allow for water quality, cleansing, wildlife habitat, and help to maintain the value of the wetland resource. Tr. III, 35-36. However, this does not address whether a 100-foot buffer is either adequate or necessary for protection of the resources.

11. This could have been accomplished through the use of existing authoritative studies on the habitat and range of spotted salamanders, wood frogs, caddis flies, or fingernail clams. An expert, such as Ms. Chagnon, could then supplement exiting authoritative studies with direct observation and data collected from the site.

12. If the Board had felt that insufficient information describing the proposal had been provided to it during the local hearing or at the commencement of the appeal, 760 CMR 31.02(2) gave it the right to raise that issue by motion. It did not do so. The requirement in that section of the regulations—that a complete description of the proposal be provided—does not, of course, relieve the Board from presenting a thorough factual case during the de novo appeal.

concern which supports denial of the permit, there is no need to address the second part of the analysis in determining whether local concerns outweigh the need for affordable housing.

IV. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Town Board of Appeals is not consistent with local needs. The decision of the Board is vacated and the Board is directed to issue a comprehensive permit as provided in the text of this decision and the conditions below.

1. The comprehensive permit shall conform to the Agreement and Stipulation for Entry of Judgment for the construction of 40 condominium units in 10 clusters of 4 units each, except as provided in this decision. Exh. 3.

2. Condition 1 of the Agreement and Stipulation for Entry of Judgment is replaced with 760 CMR 31.08:(4), which addresses "Lapse of Permits" and shall state, "If construction authorized by a comprehensive permit has not begun within three years of the date on which the permit becomes final, the permit shall lapse. The permit shall become final on the date that the written decision of the Board is filed in the office of the city or town clerk if no appeal is filed. Otherwise, it shall become final on the date the last appeal is decided or otherwise disposed of. The Board or the Committee may set an earlier or later expiration date and may extend any expiration date. An extension may not be unreasonably denied nor denied due to other projects built or approved in the interim."

3. The comprehensive permit shall be subject to the following conditions:

(a) The development shall be constructed as shown on plans prepared by Hannigan Engineering, Inc., dated December 11, 1998, revised through November 30, 2001, entitled Sanctuary Lane an Adult Residential Community, Hopkinton, MA. Exh. 44.

4. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, s. 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board.

5. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

(d) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(e) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, s. 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

Date: May 26, 2004

Werner Lohe, Chairman

Marion V. McEttrick

Joseph P. Henefield

Glenna J. Sheveland, Counsel